

Petroleum Co.⁽²⁶⁾ point emphatically to the case here represented by the third party: "The law of the court is that a man must take proceedings to have his name removed with due diligence if he has any complaint to make." The observations of Baggallay, Lindley and Fry L.J.J. in that case support the view the third party are taking. If a man is too late to secure rectification it must follow that he is too late to avoid the contract. In that case the delay of a fortnight in repudiating the shares made it doubtful whether the repudiation in the case of a going concern would have been in time (page 434).

Having regard to all the circumstances of the case, we are of the view that the learned judge was wrong in giving summary judgment to the defendant. There is a question proper to be tried between the parties. That being so, it remains to consider the question of consolidation of the third party proceeding with Civil Suit No. 2323 of 1976.

The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject-matter of the actions "to render it desirable that the whole should be disposed of at the same time" (*Payne v. British Time Recorder Co.*,⁽²⁷⁾ *Horwood v. British Statesman Publishing Co., Ltd.*,⁽²⁸⁾ *Daws v. Daily Sketch*⁽²⁹⁾). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

Now, the causes of action in this third party proceeding and Civil Suit No. 2323 of 1976, where the plaintiffs and the defendants are the same, arise out of the same series of transactions, i.e., purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, e.g., where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.

We may add that in such circumstances, one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgments will come into existence if it is not ordered.

We therefore allow the appeal with costs here and below and issue the third party directions in terms of the application of October 3, 1977 except prayer (iii), unconditional leave to defend, and consolidation of the third party proceeding with Civil Suit No. 2323 of 1976.

Appeal allowed.

Solicitors: *Mah-Kok & Din; Ng Ek Teong & Partners.*

S. PAKIANATHAN v. R.K. STALLARD

[F.C. (Raja Azlan Shah, Wan Suleiman & Syed Othman F.J.J.)
November 16, 1978 & May 25, 1979]

[Kuala Lumpur — Federal Court Civil Appeal
No. 183 of 1977]

Practice and Procedure — Consent judgment — Order for damages made with consent of solicitor for appellant — Application to set aside order — No consent given by appellant.

In this case judgment had been entered against the appellant for broker's commission alleged to be lost as a result of the appellant's breach to perform his obligation as a guarantor under an agreement. The learned judge ordered the Senior Assistant Registrar to assess damages. The Senior Assistant Registrar made an order, with the consent of the then solicitor for the appellant, that the appellant pay the respondent A\$42,375 as damages. The appellant thereupon applied to have the order set aside as he stated that the solicitor had no authority to give consent and that there was no sufficient evidence relating to the damages.

Held: in the circumstances of this case there would be grave injustice, if the consent order were allowed to stand and therefore the order should be set aside.

Case referred to:-

(1) *Marsden v. Marsden* [1972] 2 All E.R. 1162.

FEDERAL COURT.

J.R. Devadas for the appellant.

K. Thayalan for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the dismissal by the High Court at Kuala Lumpur of a notice of motion in which the appellant (defendant in the action) sought that a court order entering judgment against him with damages to be assessed be set aside and a retrial ordered; or, alternatively, that the consent order as to assessed damages by the Senior Assistant Registrar (SAR) be withdrawn and a fresh enquiry made as to damages, and further, by an amended notice of motion, that an order for stay of the signing and filing of the Certificate in the SAR's order as to assessed damages.

The circumstances leading to the application may be summarised as follows: The respondent brought the action against the appellant claiming \$268,545.64 equivalent to A\$77,652.50 said to be the broker's commission the respondent had lost as a result of the appellant's breach to perform his obligation as a guarantor under an agreement. The respondent was broker agent, industrial auctioneer for marine construction and earth moving, mining and general plants. He was appointed agent to dispose of certain machineries and accessories by a company in Western Australia, which was receiver and manager appointed by another company, who held a debenture over the machines and accessories. By an agreement dated January 4, 1973 the respondent sold to two persons in Malaysia certain items of machineries at the purchase price of A\$617,900 or its equivalent in Malaysian currency. A clause in the agreement provided that the purchasers would arrange irrevocable letters of credit for the full purchase price to remain valid for 3 months from the date of the agreement and in the event of the purchasers failing to do so, the appellant undertook to arrange for similar letters of credit in his name for a period of 6 months from the same date. Another clause provided that in the event of

a company (on whose behalf the purchasers were buying the machinery) not being incorporated, the appellant would pay the full purchase price and would take over the liabilities of the purchasers. By a deed dated June 7, 1973, the appellant in consideration of the respondent having agreed to extend the time for payment of the purchase price due under the agreement till July 15, 1973, undertook to pay the respondent direct the full purchase price in the event of Stallard Industries (Malaysia) Sdn. Bhd. (Stallard Industries), the company that was formed, failing to pay the purchase price. The deed also provided that once payment of the purchase price was received, the respondent would deliver the machineries. Stallard Industries did not pay the respondent; the appellant failed to pay up on being called to do so. The owners of the machineries withdrew from the respondent the right to dispose of the machineries and accessories. The withdrawal, it is claimed, resulted in the respondent sustaining loss of commission in the sum claimed.

The respondent took out a summons in chambers for summary judgment and said in the affidavit that the appellant had no defence. Shortly after this, the appellant filed a defence. Paragraph 5 of the respondent's supporting affidavit said that on the strength of the agreement the respondent had made the necessary arrangements with the receiver to ship the equipments; Stallard Industries was incorporated on January 30, 1973 but no attempt had been made by the purchasers to fulfil their obligations. Four letters were attached to the affidavit. One letter was dated May 23, 1972 from Stallard Plant Group to the firm of receiver and manager indicating that the group was prepared to be the sole agent for selling the equipments under receivership to companies other than those mentioned in the letter with additional charge of 12½% (10% brokerage and 2½% advertising) and that the respondent's firm, a part of the Stallard Group, would carry out all promotion. The second letter was a reply from the receiver and manager dated June 7, 1972 stating that the Group pricings together with the commissions were acceptable and that if the sale was not successful within 12 months he would probably require another party to auction the equipments. The third letter dated September 4, 1973 from the respondent's solicitor demanded payment under the agreement to be made within 7 days; otherwise legal proceedings would be commenced. The fourth letter dated August 23, 1973 from the receiver and manager to the respondent complained of delays and stated that unless funds were remitted action would be taken under their contract (which was not enclosed).

The appellant's solicitors replied to this affidavit stating that the appellant's defence showed merit and the matter should go to trial.

At the hearing on July 9, 1974 the respondent's solicitor said that the respondent incurred loss by selling the machineries and the appellant's defence was merely a denial as to damages. The learned trial judge entered judgment and ordered the SAR to assess damages. On application for an inquiry to assess damages, the SAR issued a summons in chambers for an inquiry. The appellant filed an affidavit showing that the respondent could not have suffered any loss, as it was the respondent himself who had made pur-

chases of the equipments. But on December 17, 1976, according to the record, with the consent of the then solicitor for the appellant, the SAR made an order that the appellant pay the respondent A\$42,375 as assessed damages.

On February 23, 1977 the appellant's present solicitor filed a notice of motion seeking that the court order of July 9, 1974 be set aside and a retrial or a new trial be ordered on the grounds that the order was obtained by the respondent not disclosing all the material facts and that the appellant had discovered new material evidence, which the appellant with reasonable diligence could not have discovered; alternatively, the appellant sought that the consent order made by the SAR be withdrawn on the ground that the appellant's solicitor at the time had no authority from the appellant to give consent and that the assessment of damages was founded merely on letters dated December 22, 1975 and February 17, 1976 from the respondent to his solicitor, and these letters, it was contended, consisted of hearsay evidence and were inadmissible. He also sought that "the order of June 9, 1975" be set aside and a fresh inquiry for assessment of damages on merits be held by the court itself, instead of the SAR, or, if possible, that leave be given to appeal against the decision of the SAR. This application was supported by an affidavit, a supplementary affidavit by the appellant and an affidavit by the former solicitor. The material parts of the former solicitor's affidavit are in paragraphs 3 and 4 which read:

"3. The defendant has stated that certain facts were not disclosed to him until of late and that he prays for a chance to be heard so that all the relevant facts could be placed before this Honourable Court before judgment is passed.

4. At the time the consent was given to the order of the Senior Assistant Registrar dated February 17, 1976 the defendant says that he was not in possession of the material facts and that as such the consent was given through mistake and as such I therefore pray for an order in terms of the defendant's application."

[17th February, 1976 in paragraph 4 of the affidavit should read 17th December, 1976.]

In the supplementary affidavit, the appellant stated that he was not present at the inquiry and that he never authorised the solicitor at any time to consent to damages in the sum of A\$42,375 or any other sum; his solicitor acted without authority and did not notify him of the assessment; he came to know of the assessment when he inspected the court file after having received a letter dated January 21, 1977 from the respondent's solicitor informing him that there was a court order directing him to pay the sum and if no payment was made within 7 days, bankruptcy proceedings would be taken. He also indicated that he was applying to the SAR for withdrawal of the consent given by counsel and that the inquiry be reheard. He filed his application to the SAR on June 9, 1977. He then filed an amended notice of motion dated July 18, 1977 before the judge. In the amended notice of motion he stated that the consent given by the solicitor was by mistake or misapprehension by the solicitor as to the material facts or the extent of the solicitor's authority and also asked for an order to stay the signing and filing of the certificate by the SAR in respect of the order made on December 17, 1976.

On August 24, 1977 the court, on the respondent's side raising no objection, granted leave to amend. From the notes there did not appear to be much argument. After hearing counsel for the appellant, the court dismissed the application. In his grounds of judgment, the learned trial judge observed that it took the appellant more than 2½ years to apply for the order of final judgment to be set aside, and approximately nine months after the consent order was made by the SAR awarding damages to dispute this order; he found no merit whatsoever to justify the setting aside of either the final judgment or the consent order by the SAR as to damages.

The application to set aside the court order entering judgment and for a new trial can be disposed of briefly. It is conceded from the Bar that an appeal was lodged on September 18, 1974 against the decision of the trial court entering judgment and that the appeal was withdrawn on January 9, 1975. In this court, there seems to be a suggestion that the appellant knew about this only on January 21, 1977. But the appellant's affidavits do not disclose the reasons for the withdrawal of the appeal. They relate more to the consent order. It can only be assumed that the appellant has accepted the judgment. In any case, in his defence, he did not deny the facts but only denied that the respondent had suffered any damage. All this goes to show that the judgment should stand.

As regards the consent order as to damages, from the record it was made by the SAR on December 17, 1976. The appellant in his affidavit said that he was only aware of the order when he received a letter from the respondent's solicitors dated January 21, 1977 demanding payment. The record shows that he filed change of solicitors on February 3, 1977, the notice of motion on February 23, 1977 and the former solicitor's affidavit on or about March 18, 1977. From all this there seems to be no ground for the trial court to come to the conclusion that it took the appellant 9 months to act on the consent order. June 14, 1976 referred to by the trial court was the date on which the respondent's side filed the affidavit of the legal assistant. It was not the date on which the consent order was made. The correct date of this order was December 17, 1976 as indicated above.

The question that should be determined is whether the appellant did authorise the former solicitor to consent to the damages as awarded by the SAR. In dealing with this, consideration should have been given to the former solicitor's affidavit. As should be apparent from the affidavit, it is questionable if the solicitor had in fact the authority to give consent to the order that was made. In paragraph 3 of the affidavit he said that the appellant had stated that certain facts were not disclosed to him until of late. It will be observed that the solicitor did not say that he himself had been aware of facts on which he considered the appellant would not have been able to contradict, and that, in the circumstances, he had advised the appellant to agree to assessment in the sum stated in the consent order. In any case, since the affidavit stated that the appellant had been unaware or had not been in possession of material facts, he could not have been in a position to agree to anything. It should have been obvious that it was for

A the respondent to prove his loss, and what was available to the respondent's solicitor at the time was mere assertion as contained in Stallard Plant Sales' letters of December 22, 1975 and February 17, 1976. As Stallard Plant Sales were the auctioneers, they should have been in a position to produce at least copies of sale receipts issued or some concrete evidence of sales verified by their principal, the receiver and manager of the machineries. One of the letters also mentioned that Stallard Plant Sales also made purchases. That the sales were in fact made were not even sworn to. The letters were put in by an affidavit sworn by a legal assistant in the respondent's solicitors firm and in the affidavit he merely asserted that they showed the damages the respondent had sustained in the civil suit. Nothing was deposed from personal knowledge of facts. If all these had been considered, it is doubtful that there could have been a finding that a solicitor could have really advised his client to consent to any figure as showing loss or damage. Taking the former solicitor's affidavit by itself, it should have been apparent that there was strong force in the appellant's contention that he could not have given his consent to the damages as awarded by the Senior Assistant Registrar, and the appellant's former solicitor must have made a mistake, which he did not apparently choose to declare in more positive terms in his affidavit. Further, there seems to be no dispute that the appellant was not present at the inquiry. Under these circumstances there would be grave injustice, if the consent order was allowed to stand.

In *Marsden v. Marsden*⁽¹⁾ the Court of Appeal in England held in effect, as indicated in the 1979 White Book (The Supreme Court Practice) Part 2 at page 607, that —

F "Where a party applies to have a consent order set aside on the ground that it was made without his consent and the application is made either before or contemporaneously with its being perfected, the court has a discretion to set aside the order where grave injustice would be done by allowing it to stand."

G The principle here appears to apply to the present case. The appeal is allowed to the extent that the consent order made by the SAR is hereby set aside. It would be a matter for the trial court whether or not to hold the inquiry itself. The appellant is at liberty to make the necessary application concerning this.

H Costs in the cause. By consent the appellant's deposit of \$500 is to remain in court pending disposal of the matter by the High Court and to the account of costs, if any.

Order accordingly.

Solicitors: J.R. Devadas; Skrine & Co.

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